

## REMARKS/ARGUMENT

Claims 1-44 were presented for examination and, following the Examiner's restriction requirement whereby claims 6 and 33-44 have been cancelled, claims 1-5 and 7-32 remain in the case for examination.

### 1. Claim Rejection – 35 USC § 102

The Examiner rejects Claims 1-3, 7, and 8 under U.S.C. § 102(b) as being anticipated by Nagy U.S. Patent No. 1,550,040.

The Examiner notes that Nagy discloses “a seesaw comprising a support member (11) . . . ; a moveable member (26) connected to the support member to be moveable relative to the support member between a first position and a second position (up and down); a user support (28) . . . ; [and] a sound producing mechanism (32) connected to the moveable member to produce a sound as the moveable member moves between the first position and the second position (applicant's claims 1 and 7).” The Examiner also notes that the sound producing mechanism (32) “includes a struck member (bars 30) configured to generate sound upon being struck, and a striking member (32) associated with the moveable member and positioned to strike the struck member upon movement of the moveable member between the first and second positions with sufficient force (applicant's claims 2, 3 and 8).”

Yet, close reading of Nagy indicates that, while Nagy does disclose a seesaw, it does not disclose a “sound producing mechanism.” The bars or posts (30), the rod (31), and the cylindrical counterpoise or weight (32), col. 2 lines 94-96, do not constitute a sound producing mechanism. Instead, they provide a sliding counter weight “adjustable to counteract any minor inequalities in the weight of the users.” Col. 1, lines 20-22.

While the sliding counter weight (32) can be moved along the rod (31) by the user to adjust the balance of the seesaw, by offsetting a heavier person on the opposite arm of the seesaw, the counter weight (32) does not slide or otherwise move along the rod when the seesaw is in use. This is because the counter weight (32) includes a friction device that causes it to remain in its adjusted position on the rod (31) when the see saw is in use. The friction device is described in lines 95-100 as including a “lateral opening in which is provided a contact plug 33 pressed by a spring 34 abutting a blind head screw 35 level with the surface of the weight.” FIG.6 depicts a cross-sectional view of the “balancing weight and its supporting rod,” which displays the friction device. Lines 102-108 emphasize the fact that the counter weight (32) does not move along the rod (31) when the seesaw is in motion, by saying that, once the location of the beam (26) is adjusted on the supporting channel bracket (22) “lengthwise so as to cause the riders to be in partial equilibrium” “further adjustments” can be made “by means of the slidable counter-weight 32, which, due to the friction device therein, will remain in adjusted position.”

Nagy does not disclose or contemplate that the counter weight (32) operates as a striking member that moves along the rod (31) when the seesaw is in use and strikes the bars or posts (30) to produce sound. In fact, exactly the opposite occurs: the counter weight (32) stays in place on the rod (31) and does not slide along the rod (31) to strike the posts (30). In fact, if the counter weight (32) were configured to slide along the rod (31), this would create added imbalance when the seesaw is in use – the weight (32) would slide to the end of the rod towards the heavier user. Movement of the weight (32) along the rod (31) would be counterproductive to the purposes of the invention of Nagy stated in lines 15-23, including promoting balance and equilibrium.

Moreover, there is no indication in Nagy that the rod (31), counter weight (32) and posts (30) are configured as a “sound producing device.” There is no indication that the counter weight (32) moves back and forth striking the posts (30), and that any sound is produced by the motion, or the impact. In fact, Nagy does not mention, or even contemplate, an impact between counter weight (32) and the posts (30) because (as noted above) that is contrary to the operation of the rod (31), posts (30) and counter-weight (32). There is no mention that the seesaw even incidentally produces sound. As will be seen, Nagy does not disclose a sound-producing device, and therefore does not anticipate The 35 U.S.C. § 102 rejection therefore does not lie.

2. Claim Rejections – 35 U.S.C. § 103

The Examiner further states a 35 U.S.C. § 103 claim 1 or claims 2, 3, 7 and 8, which depend from claim 1. (a) rejection as to claims 30-32 on the basis of Nagy in view of Probst, U.S. Patent No. 2,527,763, and Souza U.S. Patent No. 2,398,122.

As noted in Section 1 above, Nagy does not disclose a sound-producing mechanism, and therefore fails to anticipate claim 1 and the other identified claims. Claims 30-32 depend from Claim 7, which in turn depends from Claim 1.

Claims 30-32 all include a sound-producing mechanism as a component, which Nagy fails to disclose. Probst and Souza also fail to teach a device with a sound-producing mechanism. None of Nagy, Probst or Souza teaches a seesaw or other recreational apparatus that includes a sound-producing mechanism combined with a moveable structure operable by the user to produce sound. Further, Nagy Probst and Souza are so unlike the apparatus of Claims 30-32, that even when their teachings are combined they do not come close to suggesting the “subject as a whole” of the apparatus claimed by Claims 30-32.

The obviousness rejection based on 35 U.S.C. § 103 does not lie, and Claims 30-32 should be allowed.

#### Allowable Subject Matter

The Examiner has noted that Claims 4, 5 and 9-29 contain allowable subject matter if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

As noted above, the Section 102 and Section 103 rejections applied to the base claim and intervening claims do not lie. Claims 4, 5 and 9-29 should be allowed as written and amended herein.

#### Comments on Claim Amendments

Applicant has amended Claims 1-5, 7-12, 15, 21, and 22-27 to provide clarification and place them in a better position for allowance, including use of struck member means and striking member means, which is consistent with the embodiments described in the specification.

#### Request for Withdrawal of Restriction Requirement as to Claims 35-38

Claims 35-38 include the embodiment described at pages 12-14 and FIG. 5 of the Applicant's specification, wherein the user applies force to move the user support and moveable member, the moveable member being a spring attached to the support surface. As will be appreciated, Claims 35-38 describe an embodiment that is very similar to the embodiments of Claims 1-5 and 7-29 in several important respects. The embodiment of Claims 35-38 operates in virtually the same way as those of Claims 7-29: the user applies force (typically a back and forth movement, although other directions of movement are possible) that results in a see-sawing motion of the user support. Further, the sound producing mechanism produces sound through movement of the user support and the moveable member that causes a striking member to

contact a struck member resulting in percussive sound, such as is produced by a rain-stick type device, a bell, a gong, and the like.

Applicant respectfully requests that the similarities are many as between Claims 35-38 and Claims 1-5 and 7-32, and that in view of the allowability of Claims 1-5 and 7-32, Claims 35-38 should be allowable as well. Applicant respectfully requests that the restriction requirement be withdrawn as to Claims 35-38, and that the Applicant be permitted to make clarifying amendments consistent with those made herein, and that these claims be allowed as depending from amended Claim 1.

For similar reasons, the Applicant requests that the Examiner consider lifting the restriction requirement as to cancelled Claims 39-41 (relating to the embodiment of FIG. 6). If the Examiner agrees to consider lifting the restriction requirement as to these claims, the Applicant requests that Claim 39 be amended to depend from currently amended Claim 1 instead of Claim 2. As will be appreciated, the sound producing mechanism of the embodiment described in Claims 39-41 generates sound through the impact of a striking member and a struck member, and the sound is produced as a result of the user applying a force, such as by pushing off the ground or other support surface, to produce an up and down motion in the moveable substrate. The interactive nature of the embodiment of Claims 39-41, and the method of sound production, are highly similar to the embodiments of Claims 1-5 and 7-32, such that the restriction requirement can be waived.

Further, the embodiment of Claims 42-43 (see FIG. 7) also includes a sound producing mechanism that generates sound by an impact or impacts of a striking member against a struck member or struck members. Sound is produced as a result of interaction of the user, or users, with the apparatus, in which the user (or users) applies a force to a moveable member that is

translated into the impact of a striking member on a struck member, and generation of sound. In this embodiment, the user or users stand(s) on a platform supported by a spring, and holding a handle connected to a central pole, also connected to the platform, move(s) back and forth thereby applying a force to the pole, and causing the pole to tilt, such that a mallet like element (a striking member) at the top of the pole strikes tines or similar objects (struck members) above the platform, such as hollow tubes, bells, wooden or metal bars, to produce a marimba-like sound. Again, the similarities to the embodiments of Claims 1-5 and 7-32 are significant and the Applicant requests that the Examiner consider lifting the restriction requirement.

The Applicant respectfully requests that Claims 1-5 and 7-32 be allowed with the amendments noted herein, and that the Examiner consider lifting the restriction requirement to cancelled Claims 35-38, 39-41 and 42-43 relating to certain of the other embodiments as discussed above. The Applicant expects to contact the Examiner in the near future to schedule a time for discussion of the present Response.

While Applicant believes no additional fees are due in connection with this filing, if the Patent Office determines additional fees are due, please deduct them from Deposit Account 08-2665.

Respectfully submitted,  
HOLME ROBERTS & OWEN LLP

By: Susan D. Campbell  
Susan D. Campbell  
Registration No. 43,529  
90 South Cascade Avenue  
Suite 1300  
Colorado Springs, CO 80903  
(719) 473-3800

Date: 7/18/05